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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

No. 821
Criminal

MARVIN L. KLINE, *Petitioner,*

vs.

STATE OF MINNESOTA, *Respondent.*

## SUPPLEMENT TO PETITION FOR REHEARING OF PETITION FOR CERTIORARI

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CApital 2-2701 — Review Publishing Co., 141 E. 5th St., St. Paul 1, Minn. — CApital 2-2701

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## SUPPLEMENT TO PETITION FOR REHEARING OF PETITION FOR CERTIORARI

The petitioner respectfully states and represents:

1. That substantial grounds available to petitioner, not previously presented, are that the conviction of the petitioner of the crime of grand larceny by the Minnesota courts rests upon a denial to him of due process of law in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

In the petition for certiorari, petitioner pointed out that the Minnesota court erred in sustaining the conviction for the reason that one of the issues submitted to the jury was whether the document, State's Exhibit H, by which petitioner

was alleged to have obtained the money in question, was either by forgery, or, if forgery was not proved, that petitioner obtained the same by means of fraud, trickery or deceit. While it appears from the petition that the conviction must have rested upon an affirmative finding by the Minnesota courts that the petitioner obtained the document by means of fraud, trickery or deceit, petitioner did not urge this as a ground for granting certiorari and does now urge as an additional ground available to him that in the final analysis, the conviction below rests upon a finding of fraud, trickery or deceit which is not sustained by any evidence at all.

This is clear from the Minnesota cases cited in the Petition and in addition thereto, by the case of State v. Friend, 47 Minn. 449, 50 N.W. 692, where the court held that the common law crimes of larceny, obtaining money by means of fraudulent or false pretenses or false tokens of writings, or by embezzlement, are declared to be larceny; but, the court at the same time pointed out that the elements of the common law offenses must be stated; that the crime of larceny involves a trespass which must be proved as such; and that, where the crime is alleged to have been obtained by fraudulent or false pretenses, or false tokens or false writings, the facts must be alleged and the crime can be proved only by proof of the means alleged in the indictment. Likewise, larceny cannot be proved by proof of obtaining the property by means of false pretenses, tokens and writings for the reason that in such cases, there is no trespass. In the Friend case, the Supreme Court of Minnesota said (50 N.W. 2d 693):

> "Section 415, Pen. Code, declares that certain acts therein set forth, with the intent stated, shall constitute the

offense of larceny; and enlarges the definition of this term, by including other kindred offenses against property, some, if not all, of which in practice required a different form of indictment and different proof on the trial. The offense is committed when a person with such intent takes from the possession of the true owner, or of any other person, any money, personal property, etc.; or (2) obtains it from such possession by color or aid of fraudulent or false pretenses, or of any false token or writing; or (3) secretes, withholds, or appropriates it to his own use, or that of any person other than the true owner; and (4), there is included under the second division of the section the case of the misappropriation of such property with a like intent, by persons occupying fiduciary or semi-fiduciary relations. Here, then, we find false pretenses and embezzlement as well as what was previously known as larceny at the common law. More particular specifications appear in the following sections, defining the grades of the offense. In this case we have to deal with a charge of the felonious taking of property under an indictment for larceny which would have been good at the common law or under the General Statutes, and upon the trial of such indictment the facts stated in the first specification above referred to could always have been proved. The word "take" has a definite and well understood signification in connection with the offense of larceny, and implies a trespass; and the averment, 'did wrongfully' and feloniously 'take, steal, and carry away,' involves the possession, and the wrongful taking, of the property from the actual or constructive possession of the owner, general or special, and without his consent. 2 Bish. Crim. Law, Sec. 823 et seq. Under the second specification, however, where property is obtained by false pretenses, an indictment in this form would be insufficient to admit proof of the facts necessary to establish the offense. But the objection would lie, not the admission

> of the indictment, but to the admission of the evidence under it. A similar construction is given to the same section in the New York Penal Code, in People v. Dumar, 106 N.Y. 502, 13 N.E. Rep. 325. The order overruling the demurrer is affirmed, and the case remanded for trial."

It appears beyond any question that he did not take the money forcibly.

2. Under the rule stated in the Friend case, petitioner could be found guilty only by an affirmative finding by the jury that he either forged the State's Exhibit H, or that he obtained the possession of it by means of fraudulent or false pretenses.

In the court below, as the Supreme Court of Minnesota said, there was no evidence to support a finding of forgery and the Attorney General of the State of Minnesota admitted before the Supreme Court of Minnesota that such was the fact.

The conviction therefore, is void under the doctrine of Thompson v. Louisville, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654, 80 A.L.R. 2d 1355, because it resulted without evidence to support it, where this court tersely said:

> "This we find no evidence whatever in the record to support these convictions just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt."

That is precisely the situation which appears here as a matter of law.

Likewise, the submission of the issue as to whether or not the petitioner obtained State's Exhibit H by means of fraud, trickery or deceit, with the issue as to whether he was guilty of grand larceny upon other grounds is equally objectionable for the reason that where a general verdict is taken the court cannot say whether the petitioner is convicted upon a finding which has no evidentiary support. This is made clear by the cases cited on page one of the Petition for Rehearing and also on pages 25-27 of the Petition for Certiorari. As said in Williams v. North Carolina, which is one of the cases so cited (317 U.S. 292):

> "To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights."

It is to be remembered as we pointed out above, that upon a retrial, the offense of grand larceny by means of an unlawful taking could not be proved and also that a conviction of the crime charged could not be had upon such indictment for lack of proof of forgery by petitioner of State's Exhibit H and of the allegation that he obtained the same by means of fraud, trickery or deceit.

3. Accordingly, petititoner urges the court to reconsider the Petition for Certiorari in view of the foregoing circumstances.

## CERTIFICATE OF COUNSEL

Counsel for the petitioner hereby certifies that the petition is presented in good faith and not for delay and further certifies that the Petition is restricted to the ground above specified in part i hereof.

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